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Supreme Court, U.S.
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No. 02-931

In the
# Supreme Court of the United States

AIRSTAR HELICOPTERS, INC.,
*Petitioner,*

v.

FEDERAL AVIATION ADMINISTRATION; *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

The National Parks Overflights Act, 16 U.S.C. § 1a-1, was adopted for the purpose of protecting the resources of the Grand Canyon National Park from adverse impacts associated with aircraft overflights. In taking action to implement the Act, the Federal Aviation Administration and National Park Service limited the number of flights each air tour operator could fly over the Park. Although the Act was silent as to its applicability to Native Americans, the agencies nonetheless carved out an exemption for flights landing at and taking off from an airport operated by an Indian Tribe. The exemption was created for the sole purpose of providing a commercial advantage for members of the Indian Tribe. In light of the agencies' action in interpreting a congressional statute, the questions presented are as follows:

1. Whether federal agencies' interpretation of a statute that raises serious constitutional questions under the equal protection component of the Due Process Clause of the Fifth Amendment because it creates a racial classification exempting members of an Indian Tribe from its requirement should be subject to strict scrutiny review under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and not the rational basis test under *Morton v. Mancari*, 417 U.S. 535 (1974).

2. Whether federal agencies have the authority to carve out exemptions from environmental regulations to benefit members of Indian Tribes without specific authorization by Congress to do so.

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## REPLY BRIEF OF PETITIONER

AirStar Helicopters, Inc. (AirStar), respectfully files this reply to the Brief for the Federal Respondents in Opposition and Brief in Opposition for Hualapai Indian Tribe.

## ARGUMENT

### I

### AIRSTAR HAS STANDING

AirStar has standing to challenge the Hualapai exception to the Limitation Rule under *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). In *Northeastern Florida*, this Court held that the "injury in fact" in an equal protection case "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666. *Northeastern Florida* elaborates:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

*Id.*

The Limitation Rule places severe restrictions on the commercial air tour business over Grand Canyon National Park. To remain in business, AirStar must compete under the Limitation Rule that severely limits the number of flights it can fly over the Park. Petitioner's Appendix (Pet. App.) at A-6, F-21. The Hualapai exception, however, grants a near monopoly

on permitted flights over the Park to the Tribe and those willing to pay the monopoly premium necessary to contract with the Tribe. Pet. App. at F-28, F-31 to F-32, F-102 to F-102. AirStar cannot compete on an equal basis for overflight rights because the Federal Aviation Administration (FAA) has already decided to grant unlimited overflight rights to the Hualapai and to limit the rights of everyone else. Pet. App. at F-43. This decision is based solely on the race of those who will gain economic benefit from this monopoly on overflight rights. Pet. App. at F-31. Under *Northeastern Florida*, AirStar has standing to challenge this discriminatory distribution of government permits. 508 U.S. at 666.

This injury is not cured by granting AirStar an opportunity to pay a monopoly premium to the Hualapai in order to regain the overflight rights denied by the Limitation Rule. *Cf.* Brief for the Federal Respondents at 5. The injury is the denial of the right to compete for overflight permits on an equal basis—a right not cured by forcing AirStar to pay the Hualapai a monopoly premium in order to continue in business.

In addition to the unequal competition, AirStar suffers injury from the federal agencies acting beyond their authority to grant a monopoly on overflight rights to the Hualapai Tribe. The Hualapai exception places AirStar at a competitive disadvantage. First, the Limitation Rule caps the number of flights AirStar can fly. Pet. App. at A-6, F-21. The financial injury AirStar will suffer under the Limitation Rule is well documented. AirStar, a small business, is unique among the 24 commercial operators that fly air tours at the Grand Canyon. Pet. App. at F-64, F-72, F-75 to F-76, F-96, Administrative Record (Adm. Rec.), Vol. 15 at 139; Vol. 16 at 162, 165. AirStar is the only commercial air tour operator that has a mixed fleet of both airplanes and helicopters. Adm. Rec., Vol. 15 at 139; Vol. 16 at 162, 165. It flies out of the Grand Canyon National Park Airport located at Tusayan, Arizona, and conducts tours over the eastern portion of the Grand Canyon.

Adm. Rec., Vol. 7, Operator Forecast at 79. *See also* http://www.airstar.com.

Under the Limitation Rule, AirStar will suffer a net operating loss for its airplanes of $27,259 in 2000, $64,211 in 2000-2001, $236,474 in 2000-2004, for a total loss from 2000-2009 of $749,449. Adm. Rec. Vol. 7, Operator Forecast at 79. AirStar will suffer similar losses for its helicopters of $103,439 in 2000, $243,657 in 2000-2001, $897,330 in 2000-2004, for a total loss from 2000-2009 of $2,843,878. *Id.* Whether measured under the "substantial interest" test of 49 U.S.C. § 46110(a) or the decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), AirStar has demonstrated injury in fact from the Limitation Rule.

The purpose of the Limitation Rule is to reduce the noise associated with aircraft overflights. As Federal Respondents readily concede, Congress charged them with the duty to take "actions necessary for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights." Brief for Federal Respondents at 2. By granting unlimited overflights to businesses contracting with the Hualapai owned airport, these agencies made the goal of noise reduction much more difficult to attain. This would explain the draconian nature of the Limitation Rule itself.[1] If AirStar is successful in having the Hualapai exception struck down, the

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[1] Federal Respondents cannot argue that the Hualapai exception was granted without regard to the noise it would generate. The record contained studies of the noise attributed to the Hualapai-owned airport. Adm. Rec., Vol. 14, Review of Scientific Basis for Change in Noise Impact Assessment Method at 107; Vol.16, Comments from the Hualapai Tribe at 164; Vol. 16, Final Supplemental Environmental Assessment at 184. Further, failure to account for the noise generated by the exception would make the entire rule arbitrary—that is, the agencies would not know if the combination of the Limitation Rule and the Huapalai exception created more noise than without the rule.

agencies would be required to reconsider the Limitation Rule—without the noise created by the unlimited overflight granted in the exception. In such a case, AirStar will have the opportunity to argue for a Limitation Rule that will not have such a draconian effect on its operations. This is more than sufficient to establish standing to challenge authority of the Federal Respondents to grant the Hualapai exception. *See Lujan*, 504 U.S. at 560-61.

There can be no question that AirStar has suffered injury in fact that is fairly traceable to the challenged rule.

## II

## FEDERAL AGENCIES DO NOT HAVE UNLIMITED AUTHORITY TO MAKE POLICY CHOICES

In defending the Hualapai exemption, the Federal Respondents claim that federal agencies are free to regulate on ***any*** subject not specifically forbidden by Congress in the statute. According to Federal Respondents, because Congress did not speak directly to the question of providing an exception for flights landing at or taking off from the Hualapai airport, "the FAA and the National Park Service were free to ensure that their overflight regulation would not adversely affect the economic development and self sufficiency of the Hualapai Tribe." Brief for the Federal Respondents in Opposition at 10.[2]

Federal Respondents rely on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to make the remarkable statement that a federal agency "is free

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[2] The Federal Respondents point out that the Overflight Act had expressly provided for certain limited Indian exemptions from the Overflight Act. Federal Respondents' Brief at 10. This shows that Congress had already determined the extent to which the Overflight Act could be exempted and by its silence declined to create further exemptions.

to pursue any reasonable policy choices unless Congress has spoken directly to the issue." Federal Brief at 9-10. This expansive view of federal agency authority is particularly troublesome because the Hualapai exemption is contrary to the policy choice made by Congress in adopting the Overflights Act. Congress intended to protect the resources of the Grand Canyon National Park from adverse impacts associated with aircraft overflights. Yet, the "policy choice" of the federal agencies grants the Hualapai Tribe near monopoly power in the sale of overflight rights as long as the flight takes off or lands at the Hualapai airport. Thus, the FAA's policy choice overrode the policy choice of Congress and, in effect, granted to the Indian Tribe monopoly power over flights in the Park.

Respondents' claim that federal agencies have independent policy making ability "unless Congress has spoken directly to the issue." This is at odds with the holding of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), that an agency "has no power to act . . . unless Congress confers power upon it." Petitioner cited this case in its petition, but Respondents did not address it.

A further conundrum is posed by Respondents' arguments when the agency's interpretation of a statute raises serious constitutional questions. In *Williams v. Babbitt*, 115 F.3d 656, 657 (9th Cir. 1997), the Ninth Circuit said that the agency's interpretation was permissible, but the court would not defer to it because such an interpretation raised serious constitutional questions. *Id.* at 661-62. In other words, the constitutional concerns trumped the *Chevron* doctrine. Yet, here, Respondents argue that as long as Congress is silent, a federal agency can make policy choices that raise grave constitutional

problems, and reviewing courts should simply defer to the agency without providing any scrutiny whatsoever.[3]

## III

## THE HUALAPAI EXCEPTION CANNOT BE SQUARED WITH THE CLEAR STATEMENTS IN *ADARAND CONSTRUCTORS, INC. v. PENA*

In their attempt to have *Morton v. Mancari*'s rational basis standard of review undisturbed and expanded to include any action taken by a federal agency involving Indian matters, Respondents assert that *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), did not throw *Mancari* into doubt. Federal Respondents' Brief at 7, Hualapai Brief at 7. Yet, *Adarand* was categorical; it stated that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. This Court did not state that the standard applied to "all governmental action based on race, except for governmental action related to Indians or Indian Tribes." If a federal agency could avoid strict scrutiny by declaring that a scheme of classification, even though defined by degree of blood of a particular ancestry, was not a racial classification, then the protections of the Fifth and Fourteenth Amendments would be rendered meaningless.

Respondents fail to address Petitioner's argument that the decision of the lower court cannot be squared with the clear

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[3] Respondents' troubling argument extends *Morton v. Mancari*, 417 U.S. 535 (1974), to mean that the FAA, and by inference all federal agencies, has the same "*sui generis*" relationship with Indian Tribes as the Bureau of Indian Affairs although the Respondents cannot cite to any congressional authority granting the FAA a "special relationship" or treaty power to deal with Indian Tribes. The cases and statutes cited in the Brief in Opposition for Hualapai Indian Tribe at 10-13 do not give federal agencies the authority to single out Indians for special treatment without authority from Congress.

statements in *Adarand*.[4] They argue that because this Court in *Adarand* overturned *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and not *Mancari*, *Mancari*'s rational basis standard of review remains intact.

In *Adarand*, this Court noted that *Metro Broadcasting* undermined the three propositions established by the Court's earlier equal protection cases—congruence between the standards applicable to federal and state racial classifications; skepticism of all racial classifications; and consistency of treatment irrespective of the race of the burdened or benefitted group. *Adarand*, 515 U.S. at 226-27. This Court also noted that the three propositions undermined by *Metro Broadcasting* "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*"; that, "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" and that, "[t]o the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled." *Id.* at 227.

All of the three equal protection propositions enunciated by this Court in *Adarand* are similarly undermined by the standard of review applicable to federal legislation affording special treatment of Indians announced in *Mancari*. First, the formulation that all that need be shown is that the special treatment is tied rationally to Congress' unique obligation toward the Indians undermines the principle that the same equal protection standards apply to federal and state racial classifications. No state would be permitted to discriminate among its citizens on the basis of race in this way, unless the state was acting for the federal government under a delegation of its Indian Commerce Clause authority. Second, the *Mancari*

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[4] Interestingly, the program struck down in *Adarand* considered American Indians as a race for preferential purposes, not constituents of a quasi-sovereign political entity. *Adarand*, 515 U.S. at 205.

formulation holds that "certain racial classifications ('benign [Indian]' ones) should be treated less skeptically than others" (*Adarand*, 515 U.S. at 227), thereby undermining the principle of skepticism. Third, the analysis in *Mancari* and its progeny undermine the principle of consistency because, "the race of the benefited group [Indians] is critical to the determination of which standard of review to apply." *Id.* In short, to the extent that *Mancari* held that a standard of review less than strict scrutiny is applicable to federal legislation affording special treatment to Indians, that case should be expressly overruled by this Court.

## IV

## THE HUALAPAI EXCEPTION CANNOT BE RECONCILED WITH THE "UNIQUE INDIAN INTERESTS" TEST IN *WILLIAMS v. BABBITT*

Federal Respondents attempt to reconcile the Hualapai exception with *Williams v. Babbitt*, 115 F.3d 657, by arguing that these flights are "conducted under contract with the Tribe, it is limited to flights that land on the Tribe's Reservation; it preserves the economic foundation of the Tribe's capacity for self government; and it gives non-Indians additional opportunities to conduct air tours." Federal Respondents' Brief, at 11. But exempting these flights from the Limitation Rule for the sole purpose of providing a commercial advantage of uninterrupted access to tourists and air tour operators does not meet the "unique Indian interests" test in *Williams*—these flights are not about Indian land, tribal status, self-government, or culture rooted in the "unique status of Indians." Instead, they are the result of a blatant racial classification aimed at assisting Indians economically. In *Williams*, the Ninth Circuit recognized the "grave" constitutional questions raised by the Interior Board of Indian Appeals' interpretation of the Reindeer Act. It limited *Mancari*'s application to "statutes that affect uniquely Indian interests." Such an interpretation of *Mancari* contrasts sharply with the District of Columbia Circuit's

expansive view as to what types of special treatment are shielded by *Mancari.* Given the grave constitutional concerns raised when federal agencies, without express authorization from Congress, create racial classifications for the sole purpose of providing "naked preference for Indians" unrelated to their "unique Indian interests," this Court should grant certiorari.

## CONCLUSION

For the foregoing reasons, and those in the Petition for Writ of Certiorari, Petitioner respectfully requests the petition be granted and a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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Respectfully submitted,

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